IN THE COURT OF APPEALS OF IOWA

No. 6-169 / 95-702

IN RE THE MARRIAGE OF ROBIN L. MAXWELL AND JOSEPH L. MAXWELL

FILED
AUG 30 1996
CLERK SUPREME COURT

Upon the Petition of
ROBIN L. MAXWELL,

Petitioner-Appellee,

And Concerning
JOSEPH L. MAXWELL,

Respondent-Appellant.

Appeal from the Iowa District Court for Clinton County, C.H. Pelton, Judge.

Joseph Maxwell appeals from the district court's nunc pro tunc order increasing his child support. **AFFIRMED.**

Bradley Norton and Tricia L. Spratt of Norton & Norton, P.C., Lowden, for appellant.

Ben Rowold, Clinton, for appellee.

Considered by Sackett, C.J., Vogel, J., and McCartney, S.J.*

*Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

The appellant, Joseph L. Maxwell ("Joseph"), appeals from a nunc pro tunc order of the district court which increased the amount of child support Joseph is to pay. We affirm.

The marriage between Joseph and the appellee, Robin L. Maxwell ("Robin"), was dissolved in 1987. The parties have five children. Joseph received physical care of the older two children and Robin was granted the physical care of the three younger children.

In March 1994, Joseph filed his application for rule to show cause why Robin should not be held in contempt for having denied him visitation with the three children physically placed with Robin.

Robin denied such allegations and, in turn, filed an application for rule to show cause why Joseph should not be held in contempt for failure to pay child support. Her application further requested a modification of the dissolution decree whereby the child support obligations incurred by Joseph would be increased. She further requested that he pay certain health insurance and some of the uninsured medical expenses incurred by the children.

On July 1, 1994, a "settlement conference" between the two parties regarding these issues was conducted by another district court judge. Her report to the trial court stated that "the economic issues settled, but visitation has to be litigated." This

report was filed on July 5, 1994, and was in front of the trial court at the time of the July 13, 1994 hearing on the parties' respective applications.

Before evidence was adduced at the hearing, counsel for both parties stipulated that Joseph would pay $172.50 per week child support based upon the child support guidelines. The trial court then made inquiry of the parties as to whether or not such new support would be a "substantial modification from the current amount." Counsel for Joseph stated it was a substantial change, and that "[Joseph] was [then] paying $40 per week." The parties further stipulated at that time Joseph would receive all three income tax exemptions for the children.

There was then introduced into evidence Joseph's financial statement supporting the modification of child support from $40 per week to $172.50 per week.

Another colloquy between court and counsel reflected the court understood that after the agreement on the increase in child support, each party had a "rule to show cause against the other" and, as further pointed out by counsel for Joseph, the issue of modification of visitation requested by Joseph remained an issue to be resolved.

Counsel for Robin then withdrew her application for rule to show cause why Joseph should not be held in contempt for failure to pay child support in view of his stated agreement to pay the increased child support above noted. ..

In view of the foregoing, the trial court then asked for clarification as to the issues then remaining and was advised by both counsel that the "two things left" were

"[Joseph's] rule to show cause against [Robin] and [Robin's] application to modify [Joseph's] visitation rights."

The trial court then proceeded to take evidence on the issues agreed upon. At the conclusion of the hearing and from the bench the court found that Joseph had failed to prove Robin had wilfully refused to comply with the decree in terms of visitation and further found that Robin had failed to prove a substantial change of circumstances warranting a modification "in terms of visitation." Based upon these findings, the trial court dismissed both the application for rule to show cause and the application for modification of the decree. The court did not further allude to the agreements made as to the increase in child support and the granting of the three income tax exemptions to Joseph.

After the hearing, counsel for Robin proposed substituted and amended findings of fact and order to include the increased child support and the tax exemptions, but also included in the proposed order the requested health insurance and medical expense provisions of the application to modify and failed to include any language regarding different visitation of the children by Joseph.[1]

Counsel for Joseph refused to concur in the proposed findings, and thereafter counsel for Robin filed an application for order nunc pro tunc to include these matters. Joseph resisted the application for the nunc pro tunc order and the trial court

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[1] The health insurance and medical expenses had not been agreed to by Joseph.

denied the application. At the time of that hearing, the court indicated it could not recall the details of the hearing in those regards. As a consequence of that observation by the court, counsel for Robin caused a transcript to be prepared of the hearing held on January 13, 1994, and renewed her request for a nunc pro tunc order appending a copy of the transcript.

At this time, upon its second submission of the application with the appended transcript, the trial court granted the order nunc pro tunc as to two matters -- the increased child support and the three income tax exemptions to be awarded Joseph.

Throughout these latter proceedings, counsel for Joseph raised objections to the entry of a nunc pro tunc order asserting that cause did not warrant the entry of such order. The trial court, however, did enter the present order appealed from upon this second submission of the request for a nunc pro tunc order.

The parties agree that the scope of review in this matter is de novo. We determine if there has been an abuse of discretion by the trial court.

Nunc pro tunc orders may be used to correct mistakes or which make the order conform to the record; adjudications inferentially made but which are overlooked in the final order may also be corrected by a nunc pro tunc order. *Federal Land Bank v. Dunkelberger*, 499 N.W.2d 305, 308-309 (Iowa App. 1993).

Although the appellant stresses the fact the trial court dismissed the appellee's application to modify the previous dissolution decree with respect to child support, arguing that such dismissal nullified the child support increase agreed upon in open

court, such analysis does not resolve the issue since nunc pro tunc orders are often times used to correct oversights, even after a decree or final order has been entered.

The record here clearly reflects that the court had before it at commencement of trial the pretrial settlement conference report from another district court judge indicating that all economic issues had been resolved but visitation problems would be the issue. At the commencement of the trial, the appellant and the appellee both agreed in open court the child support would now be paid at the rate of $172.50 per week, an increase from the then-existing $40 per week child support. The court acknowledged receipt of this information provided by counsel for both Joseph and Robin and asked counsel whether or not there were "two things left . . . ." The court was referring to Joseph's application for rule to show cause concerning visitation and Robin's application to modify visitation rights, and both counsel agreed.

In open court, counsel for the appellee, in consideration of the voluntary agreement by Joseph to increase his weekly child support payments from $40 to $172.50, stated, "In consideration of the stipulation [pertaining to child support], we [Robin] will withdraw our request to hold [Joseph] in contempt for failure to pay child support."

In ruling from the bench, the court then through oversight directed its attention to what it believed to be the only two issues, child support having been resolved, and denied the applications of both Joseph and Robin.

Upon a review of the transcript of the hearing, the trial court then entered its nunc pro tunc order pertaining only to the child support increase and the three income tax exemptions for the children.

The court was, at trial, advised that the increased child support was in accordance with the child support guidelines and also had before it the financial statement supporting such increase.

Stipulations were made at trial, consideration was given for the relinquishment by one party of a portion of its request for relief and withdrew it from the court's consideration. *In re Marriage of Ask*, ___ N.W.2d ___ (Iowa 1996). The court was fully apprised of the agreement and it is obvious from the record, concurred in it.

We find the court inferentially approved the modification as to child support.

Based upon the foregoing, the nunc pro tunc order of the trial court is affirmed.

AFFIRMED.